United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

S.A.M. DATE: April 22, 2015

TO: Marlin O. Osthus, Regional Director
Region 18

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Seagate, 18-CA-138463
Boston Scientific, 18-CA-138485, and
Medtronic, 18-CA-138607

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The Region submitted these cases for advice on whether three businesses that contract with janitorial companies to provide daily cleaning services at their facilities violated the Act by denying access to the janitorial employees' union representative where the contract between the union and the janitorial companies contained access clauses. We conclude that the Region should issue complaint, absent settlement, alleging that each of the businesses violated Section 8(a)(1) because their respective denials of access were discriminatory. We also conclude that additional investigation is needed in order to determine whether, even in the absence of discrimination, the businesses violated the Act by denying the union access to their non-secure interior areas and parking lots, as well as secure interior areas, under a balancing of the businesses' property interests against the Section 7 rights of the union and the employees it represents and consideration of reasonable, effective alternative means of communication.

FACTS

Seagate, Medtronic, and Boston Scientific (collectively, the "businesses") are unrelated companies with operations in the Minneapolis/St. Paul, Minnesota area. Seagate is a data storage company that offers products and services related to the storage and recovery of electronic data. Boston Scientific manufactures products and creates technologies that are used to diagnose or treat a wide range of medical conditions. Medtronic is the world's largest medical technology company.

Each of these employers has a contract with a janitorial/cleaning company that provides daily cleaning services at their respective facilities. Seagate and Boston

Scientific have contracts with ABM Janitorial Services (ABM), and Medtronic has a contract with SBM Site Services (SBM). ABM and SBM are members of the Minneapolis-St. Paul Contract Cleaners Association (Association), which is a multi-employer bargaining association that has a collective-bargaining agreement with SEIU Local 26 (Union). Article 18.6 of that agreement contains a Union access provision, entitled "Conference with Union Representatives," which states:

> Union representatives shall, at all times, be permitted to confer with employees in the service of the Company, provided it does not interrupt or interfere with the Company's operation. The union recognizes that work under this agreement is sometimes performed in buildings under control of customers of the Company and in buildings requiring security clearances. In such cases the Union agrees to make arrangements for conferences with employees so as not to interfere with the operation of the building in question and the Company agrees to cooperate with the Union in making these conferences in a reasonable manner and consistent with the demands of security and other establishment rules prescribed by the owner.

SBM, ABM, and the Union agree that Article 18.6 was intended to permit the Union to meet with employees on their respective jobsites and does not merely incorporate employees' statutory right to speak with their Union representative. The Union has utilized this contractual access clause to enter the property of several ABM clients and meet with ABM's janitorial employees at their worksites. When visiting an ABM client's property, the Union representatives typically meet with a group of employees in the employees' lunch or break area.[1]

In 2013, the Union and the Association negotiated a new collective-bargaining agreement. In response to employees' concerns about their workloads being too demanding, the Union pressed for and secured a new contractual provision (Article 19.1) relating to employees' workloads, which provides for "work assignment reviews" and "walkthroughs" at jobsites. This contractual language provides, *inter alia*:

> The Company shall not impose an unreasonable workload upon any employee, and should there be a substantial change in workload, the employees' work hours shall be reviewed and adjusted as appropriate. . . . The employer shall not unreasonably deny an employee's written request

[1] There is currently no evidence regarding the Union's visits to other properties of SBM clients.

> for a written description, review and/or walkthrough of their work assignment. . . . The employee may request that the building steward be present during the review. If no building steward has been designated for the building in question, the employer shall mutually agree that an individual from a pool of union designated, trained stewards or representatives from the same employer may accompany the individual on the review and/or walkthrough. Work assignment reviews and walkthroughs shall not interfere with the operation of the building in question and be subject to security and other establishment rules prescribed by building management.

I. The Union's Requests for Facility Access are Rejected.

A. Medtronic (SBM)

The Union represents approximately seventy SBM janitorial employees, each of whom works regularly at one of Medtronic's five locations in the Minneapolis/St. Paul metropolitan area. Although the Union was previously able to meet with Union-represented employees at Medtronic's properties without incident over seven years ago when ABM was Medtronic's cleaning contractor, the Union has not been permitted such access while SBM has held the contract.[2]

In February 2013, Medtronic contacted SBM officials regarding a newspaper article stating that the Union was preparing to engage in an economic strike related to the Association's refusal to agree to certain Union-requested contractual provisions. Medtronic sought assurances from SBM that it would be able to provide at least a minimum level of cleaning services if the Union-represented employees who worked at Medtronic's facilities participated in the anticipated strike. During these communications, Medtronic informed SBM that Union officials were not permitted on its property, but did not indicate that any written Medtronic access rule or policy precluded the Union from accessing its facilities.

In early 2014, the Union requested that SBM assist it in gaining access to the employees it represents at Medtronic's facilities. According to the Union, it explained to SBM that the SBM employees who worked at Medtronic were complaining about their workloads. These complaints were exacerbated in the spring when Medtronic requested less vacuuming at its facilities, which resulted in SBM determining that it

[2] The copy of the Medtronic/SBM service contract provided to the Region, and an addendum to that contract, have been mostly redacted.

needed to lay off employees and increase the remaining employees' workloads. The Union was ultimately able to reach an agreement with SBM to rescind some of those layoffs, and the Union wanted to access the Medtronic facilities in order to ensure that SBM was abiding by its agreement with regard to layoffs and workload. That summer, the Union contacted SBM and requested access to the Union-represented employees at Medtronic's facilities. SBM was unsuccessful in obtaining access for the Union, however, so the Union engaged in direct communications with Medtronic. Specifically, the Union indicated it was willing to meet with employees during their break time or before their shifts in the conference room outside of Medtronic's secured areas. It is unclear whether SBM or the Union communicated to Medtronic that the Union was seeking access in order to ensure that SBM was abiding by its agreement with regard to layoffs and workload. On July 23, Medtronic sent SBM a letter, which stated that Medtronic was denying the Union's request for access because "[f]or security reasons, and pursuant to its well-established, uniformly applied policy, Medtronic only allows access to those with a clear business reason to be on Medtronic property."

Around the time of the Union's access requests, Medtronic's (b) (6), (b) (7)(C) revised the company's Access Control Standard policy in response to the Union's request for access. On July 16, (b) (6), (b) emailed Medtronic's (b) (6), (b) (7)(C) and requested that (b) (6), (b) revise the policy, because Medtronic needed "to get this approved soon as [the Union] is doing a hard press" to gain access to the Medtronic facilities. The primary revision to the policy was a provision entitled "Visitors and Events," which provides:

> All persons and groups must obtain permission before entering Medtronic property. This includes guests of an active Medtronic employee who can grant such permissions. There must be either a) a clear Medtronic business reason to be on Medtronic property, and/or b) have a direct invitation from Medtronic or Medtronic employee(s).

B. Boston Scientific and Seagate (ABM)

Approximately thirty ABM employees work at the three Boston Scientific locations in the Minneapolis/St. Paul metropolitan area. Boston Scientific's service contract with ABM states, *inter alia*, that ABM "will use its best efforts to avoid any work stoppages, slowdowns, disputes and strikes" with its workers, and that if they occur, ABM will ensure that Boston Scientific receives at least a "minimum level" of cleaning services.

ABM also provides cleaning services at Seagate's facilities in Bloomington and Shakopee, Minnesota. Approximately fifteen ABM employees work at each facility

during the day, and fewer employees work at the facilities in the evenings. ABM managers, who are on-site and have an office in the facilities, supervise the janitorial employees. Most of the Union's requests for access were for the Bloomington facility, but the Union also sought access to the Shakopee facility. The ABM employees use the same break rooms as Seagate employees.

In June 2014,[3] the Union asked ABM to assist it in gaining access to ABM customers' facilities where Union-represented ABM employees worked. According to the Union, it sought access because it was concerned about employees' workloads. ABM agreed to assist the Union and asked the Union to send it a list of the facilities it wanted to access. On August 1, the Union provided this list, which included the Seagate and Boston Scientific facilities, to ABM. ABM asked Seagate and Boston Scientific to provide access to the Union, but it is unclear whether ABM or the Union explained to Seagate and Boston Scientific that the Union was requesting access in order to police the contract's employee workload provisions.

In early August, a Boston Scientific representative called a Union representative to discuss the Union's request for access. They discussed the Union's need to access employees at work during their breaks in order to provide them with information and to receive employees' feedback about their jobs. Although the Union desired access to the interior of Boston Scientific's facility, it sought to compromise with Boston Scientific by asking to meet with employees in the parking lot. On September 8, a Union representative emailed an ABM representative and stated that [redacted] would like access to the Seagate facilities on certain specified dates. The ABM official replied that Seagate had not approved the access request. Boston Scientific and Seagate ultimately denied all of the Union's access requests.

II. Instances where the Businesses have Permitted Outside Groups to Access and Use their Facilities.

A. Medtronic

At all times material to this case, Medtronic has maintained a Facility Common Space Usage policy in addition to the Access Control Standard policy. The Facility Common Space Usage policy sets forth the process for external groups to request the use of common space at Medtronic's facilities. That policy provides, *inter alia*, that the common space is "not available for non-business use during regular business hours," that use of the space is "limited and granted to charitable non-profit organizations only," that a Medtronic employee must be on site at all events, and that the event must support Medtronic's "mission and have a direct connection to Medtronic."

[3] All dates hereinafter are in 2014 unless otherwise indicated.

Medtronic has permitted several outside, nonemployee groups to utilize its facilities. It permits the Red Cross to utilize either the interior of its facilities (e.g., areas near the main facility entrance) or its parking lot for blood drives twice a year. It has also permitted an outside group to hold a book fair near a small retail shop that is located in its interior space, and permits a farmer's market to be held in its parking lot every Wednesday from June through September.[4] A Caribou Coffee store is also located onsite for employees to patronize. The small retail shop sells a myriad of items, and vendors often set up tables and sell items, such as jewelry and fine soaps, inside or around the area of the small shop. Only those who work at the Medtronic facility are permitted to shop at Caribou Coffee and the small shop. It is unclear whether the vendors who periodically come to the small shop area to sell their products rent or otherwise pay to utilize space within Medtronic's facility.

B. Boston Scientific

Boston Scientific permits the Red Cross to hold blood drives at its facilities around May and October of each year. It also permits Costco to set up tables inside its facilities in order to sell Costco memberships to Boston Scientific employees. In the winter months, Boston Scientific also permits a charitable organization to solicit donations such as winter jackets from Boston Scientific employees.

C. Seagate

Seagate permits charitable groups to place collection boxes in its facilities in order to collect donations, but it is unclear whether a representative from the charity picks up the donations from Seagate or whether a Seagate employee delivers the collected donations to the charity. Seagate also permits organizations to hold blood drives on its premises, although it is unclear whether these blood drives occur inside its facilities or in its parking lots. On December 11, Seagate permitted various commercial vendors affiliated with the Minnesota Employee Recreation & Services Council (MERSC)[5] to hold a vendor fair in its Main Café 1, 2, & 3 in order to solicit

[4] Additionally, Medtronic has allowed various cultural events to be held at its facilities, including the "Day of the Hispanics" and a folklore event. It is unclear whether these were events that Medtronic sponsored for its employees or whether, pursuant to its Facility Common Space Usage policy, it permitted outside groups to use its space to host these events.

[5] MERSC is an organization that companies can join in order to provide their employees with discounts from various commercial vendors. *See* http://www.mersc.org/ (last accessed April 9, 2015). Medtronic and Boston Scientific are also listed as MERSC member companies, but it is unclear whether they also permit MERSC vendor fairs at any or all of their facilities. *See* http://www.mersc.org/member_companies.php (last accessed April 9, 2015) (listing Medtronic, Seagate, and Boston Scientific among MERSC member companies).

business from Seagate employees. The vendors included hotels and resorts, the U.S. Federal Credit Union, a daycare center, a local dentistry practice, Costco, Sam's Club, a dinner theatre, and a mortgage company.

Seagate also provides tours to various groups and has permitted groups to use its property for science fairs, demonstrations, and trade association meetings. For example, between 2013 and 2014, Seagate provided tours and/or demonstrations to a group from the Edina, Minnesota police department; a group from the Bakken Museum; and various middle school, high school, and college student groups. In early May, Seagate hosted the quarterly meeting for the Fab Owners Association, a trade industry group it belongs to, at its facilities. Seagate asserts that the tours it provides to outside groups are fundamentally different from the access the Union sought for meetings, because the tours create good will with the communities in which Seagate operates and are therefore consistent with its requirement that groups have a "business purpose" for accessing its property.

ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that Seagate, Medtronic, and Boston Scientific each violated Section 8(a)(1) by discriminatorily denying the Union access to their facilities while granting access to other groups. Medtronic also violated Section 8(a)(1) by maintaining a facially unlawful access rule and by discriminatorily promulgating a new access rule in response to the Union's request for access. We further conclude that, even if the access denials were not discriminatory, the businesses may have violated the Act if, under the Board's balancing test, their property rights did not outweigh the Union's Section 7 rights to enter parking lots, non-secure interior areas of their facilities, and other interior areas, including secure areas where the employees it represents may work. The Region should conduct further investigation, as set forth below, to determine if the denials violated the Act under the balancing test and resubmit the case to Advice.

I. Seagate, Boston Scientific, and Medtronic Violated Section 8(a)(1) by Denying Access to the Union While Granting Access to Other Outside Groups.

An employer may lawfully ban nonemployee union solicitation or distribution of literature for organizational purposes on its property if it does not discriminate against the union by allowing similar solicitation or distribution by other nonemployee entities.[6] A finding of unlawful discrimination generally requires

[6] *See, e.g., NLRB v. Babcock & Wilcox Co.*, 351 U.S. 104, 112 (1956). *See also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992) ("To gain access, the union has the burden of showing. . . that the employer's access rules discriminate against union solicitation.").

sufficient proof that an employer has allowed other nonemployee individuals, groups or organizations to use its premises for various activities while denying access to the union.[7] There are two exceptions to this rule. First, an employer may lawfully permit a small number of isolated "beneficent acts" as narrow exceptions to a no-access rule.[8] Second, an employer does not violate the Act when it permits nonemployee solicitations that relate to the employer's business function and purposes—the "business-related" exception—while prohibiting union access.[9] The Board has held that solicitations involving the employees' "regular benefit package," and fundraising sales where the proceeds go to the employer to fund part of its core business function, are an integral part of the employer's business functions and purposes and therefore satisfy the "business-related" exception.[10]

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[7] *See, e.g., Dow Jones & Co.*, 318 NLRB 574, 574-75 (1995) (employer unlawfully denied union access to its premises for union meetings while permitting other organizations to hold meetings, including weight-reduction and stop-smoking programs for employees conducted by independent organizations), *enforced mem.*, 100 F.3d 950 (4th Cir. 1996) (Table); *Union Child Day Care Center*, 304 NLRB 517, 525 (1991) (employer violated Section 8(a)(1) by granting access to its meeting room to parents and businesses while prohibiting the union from using it for union meetings). *See also Sandusky Mall Co.*, 329 NLRB 618, 620-21 (1999), *enforcement denied*, 242 F.3d 682 (6th Cir. 2001).

[8] *See, e.g., Lucile Salter Packard Childrens' Hospital*, 318 NLRB 433, 434 (1995) (citing *Hammary Mfg. Corp.*, 265 NLRB 57, 57 n.4 (1982)), *enforced*, 97 F.3d 583 (D.C. Cir. 1996). *See also Serv-Air, Inc.*, 175 NLRB 801, 801 (1969) (condoning two or three collections for beneficent purposes insufficient to establish disparate enforcement). *See generally Sentry Markets, Inc.*, 296 NLRB 40, 42 (1989) (determining, under *Jean Country* balancing test, that the limited presence of the Salvation Army over Christmas season did not significantly diminish employer's property right), *enforced*, 914 F.2d 113 (7th Cir. 1990).

[9] *See, e.g., Lucile Salter Packard Childrens' Hospital*, 318 NLRB at 433-34, 436, *enforced*, 97 F.3d at 589-90.

[10] *See, e.g., id.* at 433-34, 436 (finding that providing access to retirement and health plan representatives did not evidence discrimination against the union because they were part of the employees' regular benefits package); *Rochester General Hospital*, 234 NLRB 253, 258, 259 (1978) (employer did not engage in discrimination by providing access to a volunteer organization's fundraising sale, which was part of the women's board and which donated all of its profits to the employer); *George Washington University Hospital*, 227 NLRB 1362, 1369 & n.22, 1373-74 & n.39 (1977) (employer did not engage in unlawful discrimination by permitting sales events related to the employer's gift shop, which was operated by the hospital's women's board and which gave all of its profits to the employer to use for its necessary functions, while prohibiting union solicitations), *enforced in relevant part per curiam,* 1978 WL 4100 (D.C. Cir 1978).

A. Medtronic

We conclude that Medtronic engaged in unlawful discriminatory treatment when it denied the Union's request for access while granting other nonemployee groups access to its property for a variety of purposes. Specifically, Medtronic has permitted an outside group to hold a book fair near the small retail shop inside its facility and permits a farmer's market to operate in its parking lot every Wednesday from June through September.[11] Clearly, the book fair and farmer's market do not constitute a small number of "isolated beneficent acts."[12] There is no evidence that either of these activities were for a charitable purpose, and even if the "isolated beneficent acts" exception applied to non-charitable entities, the farmer's market also occurred too frequently to be considered an "isolated" event.[13] Nor do these events fall under the "business-related" exception. They clearly were not part of Medtronic's regular employee benefits package, and there is no evidence that any of the proceeds funded its core business.[14]

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[11] *See, e.g., Knogo Corp.*, 262 NLRB 1346, 1360-62 (1982) (employer unlawfully excluded union representatives while regularly admitting a nonemployee food vendor to its parking lot), *enforced in pertinent part*, 727 F.2d 55 (2d Cir. 1984); *Chrysler Corp.*, 232 NLRB 466, 466 n.2, 476-77 (1977) (employer discriminatorily enforced no-access rule against, and caused the arrest of, a former employee for distributing union literature in its parking lot where the employer permitted farmers to use the parking lot during the summer months to sell produce to employees, and permitted various food vendors to deliver food to employees in the parking lot during lunchtime), *enforced sub nom.*, *Smith v. NLRB*, 125 LRRM 3063, 1979 WL 6182 (D.C. Cir. 1979) (per curiam).

[12] Permitting the Red Cross to hold blood drives twice per year, however, falls under the "isolated beneficent act" exception. Therefore, evidence regarding these blood drives should not be used to support the disparate treatment argument.

[13] As noted in *supra* note 5, Medtronic is also a MERSC member. The Region should investigate whether Medtronic, like Seagate, has also held MERSC vendor fairs on its premises because such evidence would establish an even stronger case of unlawful discriminatory treatment.

[14] The Region should also investigate whether the various cultural events discussed in *supra* note 4 are events that Medtronic provided for its employees or whether the events were staged by outside groups that were permitted to utilize Medtronic's interior space pursuant to the Facility Common Space Usage policy. If Medtronic permitted outside groups to utilize its space pursuant to that policy, then these cultural events are evidence of discriminatory treatment. The Region should also investigate whether the outside vendors who sell items such as jewelry and fine soaps utilize space within the small retail shop or whether they set up their tables in other Medtronic interior space that is near the small shop. If the latter is the case, then providing access to the vendors would be evidence of discrimination if the vendors do not provide Medtronic with a portion of their sales to put toward Medtronic's core business function. *See* cases cited in *supra* note 10 and *Lucile Salter Packard Childrens' Hosp. v. NLRB*, 97 F.3d at 591 (discriminatory denial of access to union

Additional evidence bolsters the conclusion that Medtronic's denial of access to the Union was discriminatory. First, the provision in Medtronic's Facility Common Space Usage policy, which provides that use of its space is "granted to charitable non-profit organizations only," is facially unlawful.[15] Second, a July 16 email establishes that Medtronic promulgated a revised Access Control Standard policy in response to the Union's request for access.[16]

B. Boston Scientific

We conclude that Boston Scientific also violated Section 8(a)(1) when it denied the Union's request for access to perform a representational function with respect to ABM employees who work regularly at its facilities while permitting Costco—a commercial entity—to set up tables within those facilities in order to sell memberships to its employees.[17] Because Boston Scientific's granting of access to Costco is essential to finding a discriminatory access violation in this case, the Region

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where employer permitted access to nonemployee vendors who contributed a share of profits to an employee committee that used the funds for social and recreational events for employees; such activities were not directly related to the employer's function of providing health care and, thus, did not come within the "integral part of the employer's business function" exception).

[15] *See, e.g., Riesbeck Food Markets*, 315 NLRB 940, 940 (1994) (employer's policy, which permitted only organizations that were charitable in nature to solicit and distribute to customers, was discriminatory on its face), *enforcement denied per curiam* 91 F.3d 132 (4th Cir. 1996) (Table).

[16] *See, e.g., Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) (holding that an employer violates Section 8(a)(1) when it promulgates a rule in response to union activity).

[17] *See, e.g., Schear's Food Center*, 318 NLRB 261, 265-66 (1995) (finding unlawful disparate treatment where employer allowed voter registration, Girl Scout cookie sales, and blood pressure checks at one store, and Seventh Day Adventist literature distribution, Girl Scout cookie sales, and Jaycee voter registration drives at another store, while prohibiting union distribution); *Great Scot*, 309 NLRB 548, 549 (1992) (finding unlawful disparate treatment when employer prohibited the union from engaging in area standards picketing on its property but permitted approximately six charitable and civic organizations to use the area near store entrances for fundraising purposes and also regularly permitted two nonemployee food vendors to set up portable wagons and sell prepared food near the front of the store), *enforcement denied* 39 F.3d 678 (6th Cir. 1994); *Davis Supermarkets, Inc.,* 306 NLRB 426, 426 (1992) (finding unlawful discrimination where, on the same day that the store refused to allow the union pickets to remain in the front of its store, it permitted a charitable organization to set up a table on the sidewalk and sell raffle tickets for a car; store had previously permitted various church and school groups to use the front of the store to sell items to its customers), *enforced in pertinent part*, 2 F.3d 1162 (D.C. Cir. 1993), *cert denied* 511 U.S. 1003 (1994).

should investigate how often this occurs.[18] In addition, as noted in *supra* note 5, Boston Scientific is also a MERSC member. The Region should investigate whether Boston Scientific, like Seagate, has also held MERSC vendor fairs on its premises because such evidence would establish a stronger case of unlawful discriminatory treatment.

C. Seagate

We also conclude that Seagate engaged in unlawful discriminatory treatment when it denied the Union's request for access while granting other nonemployee groups access to its property for a variety of purposes. Specifically, Seagate has permitted various business, including hotels and resorts, the U.S. Federal Credit Union, a daycare center, a local dentistry practice, Costco, Sam's Club, a dinner theatre, and a mortgage company to solicit business from Seagate employees during a MERSC vendor fair.[19] Although it appears that Seagate likely pays a membership fee to belong to MERSC, and it is likely that most, if not all, MERSC vendors provided employees with a discount on their memberships or services, these discounts do not constitute employee benefits under the "business-related" exception.[20] In order for that exception to apply, an employer must at least partially subsidize the benefit and the benefit must be one that is ordinarily included in an employee benefits package, such as employee health and retirement plans.[21] Thus, even if Seagate did pay for

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[18] We recognize that if Boston Scientific only permitted the Red Cross to hold blood drives at its facilities a few times per year, the "isolated beneficent acts" exception would apply to those events.

[19] *See* cases cited in *supra* note 17.

[20] *See e.g., Lucile Salter Packard Childrens' Hosp. v. NLRB*, 97 F.3d at 591 (nonemployee vendors who contributed a share of profits to an employee committee that used the funds for social and recreational events for employees did not come within the "integral part of the employer's business function" exception because such activities were not directly related to the employer's function of providing health care); *Dow Jones & Co.*, 318 NLRB at 574-75 & n.3 (nonemployee organizations that allegedly "benefited" employees, e.g., Weight Watchers and a stop-smoking program that the employer partially subsidized, did not fall under "business related" exception); *Deborah Heart & Lung Center*, Case 4-CA-30363, Advice Memorandum dated Jan. 17, 2002, at pp. 6-7 (employee discount for cellular phone service that employer did not pay for was not part of employees' regular benefit package); *Lakeland Regional Medical Center*, Case 12-CA-18460, Advice Memorandum dated April 29, 1997, at pp. 9-10 (cheaper activation fees for cellular phone service was not part of employees' regular benefit package even though employer contracted for that benefit).

[21] *See, e.g., Lucile Salter Packard Childrens' Hospital*, 318 NLRB at 433-34, 436 (finding that providing access to retirement and health plan representatives did not evidence discrimination against the union because they were part of the employees'

the entirety of the membership or services that the MERSC vendors were selling, the membership or services would not constitute an "employee benefit" under the "business-related" exception because they are not benefits included as part of the employees' regular benefit package.[22]

Furthermore, Seagate also regularly provides tours of its facilities and/or demonstrations and science fairs for various groups, including museum employees; various middle school, high school, and college groups; and police officers.[23] Although Seagate contends that these tours to outside groups are fundamentally different because they fall "within its mission by fundamentally creating goodwill" in the community and are therefore "consistent" with the requirement of having a business purpose for accessing its property, the Board has previously concluded that an employer engages in unlawful discrimination by allowing certain groups access in order to "enhance business goodwill."[24]

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regular benefits package, but that providing access to the credit union and property insurance company, which were employer-subsidized employee benefits, was evidence of discrimination), *enforced*, 97 F.3d at 589-90.

[22] Although Seagate permits the Red Cross to hold blood drives in its facilities twice each year and permits another charity to collect donations, such as winter coats, from employees once or twice per year, such access would likely fall within the isolated beneficent acts exception. *See, e.g., Jewish Hospital of St. Louis*, Case 14-CA-20413, Advice Memorandum dated Jan. 19, 1990, p. 2 (exceptions in employer's written rule for solicitations by three charities fell within the "beneficent acts" exception where the United Way and/or Jewish Federation drive only occurs once a year and the blood drive occurs only twice a year).

[23] *See, e.g.,* cases cited in *supra* note 17.

[24] *See Riesbeck Food Markets*, 315 NLRB at 943 (employer engaged in unlawful discrimination by "opening up its property to a wide range of solicitation that it deems 'enhanc[ing to its] business goodwill' and forbidding—as here—the dissemination of messages protected by the Act which it deems bad for business") (alteration in original).

II. Additional Investigation is Needed to Determine Whether the Property Rights of Seagate, Boston Scientific, and Medtronic Must Yield to the Union's Section 7 Interest in Accessing the Property for a Representational Purpose.

A. General principles: a case-specific balancing test applies here.

The Board's task in access cases is to resolve conflicts between Section 7 rights and private property rights and seek a proper accommodation between the two.[25] The Board's basic objective is to fashion an accommodation of Section 7 rights and private property rights with as little destruction of one as is consistent with maintenance of the other.[26] The "locus of that accommodation," however, may fall at differing points along the spectrum depending on the "nature and the strength of the respective [Section] 7 rights and the private property rights asserted in any given context."[27] On the one hand, Section 7 of the Act affords protection to employees in their invocation of a right rooted in a collective-bargaining agreement—such as a union access provision—because invoking a contractual right is "unquestionably an integral part of the process that gave rise to the agreement."[28] Moreover, Section 8(a)(1) affords employees of a particular employer protection from another employer's interference with their Section 7 rights.[29] Employees of a subcontractor therefore have a legitimate interest in being protected from the owner's or general contractor's imposition of extra-contractual restraints that might operate to nullify important provisions of their collective-bargaining agreement.[30] On the other hand, the owner or general contractor has a legitimate interest in controlling its property and may not wish to admit the union agent onto the property.[31] Also, the owner or general

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[25] *See, e.g., Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (quoting *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972)).

[26] *See Hudgens*, 424 U.S. at 522 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. at 112).

[27] *See id.*

[28] *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984).

[29] *See, e.g., Hudgens*, 424 U.S. at 510 n.3. *See also New York New York Hotel & Casino*, 356 NLRB No. 119, slip op. at 5 (Mar. 25, 2011) (citing cases and concluding that hotel/casino, as a statutory employer, could violate the Act by coercing or restraining onsite contractor's employees in the exercise of their Section 7 rights, notwithstanding that hotel/casino did not directly employ those employees), *enforced*, 676 F.3d 193 (D.C. Cir. 2012), *cert denied* 133 S.Ct. 1580 (2013).

[30] *See, e.g., CDK Contracting*, 308 NLRB 1117, 1122 (1992) (quoting *Villa Avila*, 253 NLRB 76, 81 (1980), *enforced as modified*, 673 F.2d 281 (9th Cir. 1982)).

[31] *See CDK Contracting*, 308 NLRB at 1121.

contractor is not a party to the subcontractor's labor contract containing the access provision and does not have a bargaining relationship with the union.[32]

In cases involving union attempts to gain entry to worksites pursuant to access clauses in contracts with construction subcontractors, the Board has reasonably accommodated these competing interests by applying a balancing test derived from *NLRB v. Babcock & Wilcox.*[33] In those cases, the Board held that the Section 7 interests outweighed the general contractors' property interests such that the subcontractor must be permitted to observe its contractual obligations and the union must be permitted its contractual access rights.[34]

Although the cases decided by the Board, including *CDK Contracting*, involved contractual access provisions that did not contain a limitation that subjected the union's access rights to any and all restrictions in the property owners' own access rules, and the Board has not yet struck the balance regarding property interests and Section 7 rights where such limitations apply, the Board's jurisprudence suggests that

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[32] *Id. See also C. E. Wylie Construction Co.*, 295 NLRB 1050, 1050 n.3 (1989) (concluding that, "standing alone, the contracts [containing the union access provisions] are not dispositive," because those contracts are with the subcontractor rather than the general contractor), *enforced in pertinent part*, 934 F.2d 234 (9th Cir. 1991). *Cf. Holyoke Water Power Co.*, 273 NLRB 1369, 1370 (1985) (concluding that, on balance, a union had the right to access the property of an employer with which it had a bargaining relationship in order to observe and survey noise level hazards), *enforced*, 778 F.2d 49 (1st Cir. 1985), *cert. denied* 447 U.S. 905 (1986).

[33] *See, e.g., C. E. Wylie Construction Co.*, 295 NLRB at 1050 n.3 ("The analysis…in the instant case[] begins with the balancing test enunciated in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)."). The Board has expressly held that this accommodation is consistent with the Supreme Court's decision in *Lechmere Inc. v. NLRB*, 502 U.S. at 537. *See, e.g., CDK Contracting*, 308 NLRB at 1117. *See also Wolgast Corp. v. NLRB*, 349 F.3d 250, 255-56 (6th Cir. 2003) (stating that *Lechmere* is not a "trump card" that authorizes exclusion of every nonemployee union representative from third party property, regardless of the purpose or relationship with employees at the jobsite). Indeed, while there is a "critical distinction" between the organizing activities of employees, to whom Section 7 guarantees the right to self-organization, and to non-employees, to whom Section 7 "applies only derivatively," *Lechmere*, 502 U.S. at 533, a union seeking entry to property pursuant to a contractual access provision is attempting to carry out its non-derivative statutory duties as the exclusive bargaining representative of the subcontractor's employees. More fundamentally, giving effect to the contractual access provision furthers the employees' non-derivative Section 7 right to enjoy the benefits negotiated in their collective-bargaining agreement. *See City Disposal Sys.*, 465 U.S. at 831.

[34] *See, e.g., CDK Contracting*, 308 NLRB at 1117; *Mayer Group, Inc.*, 296 NLRB 25, 27 (1989); *Subbiondo & Associates*, 295 NLRB 1108, 1116 (1989); *C. E. Wylie Construction Co.*, 295 NLRB at 1051, 1055-56; *Villa Avila*, 253 NLRB at 79-83.

a balancing test is appropriate in that context as well.[35] Thus, the Board has not held that property owners can lawfully deny access whenever their contractors' contractual access provisions have restrictions, e.g., where the contract makes access subject to rules established by the property owner. Rather, the Board has concluded that there must be a case-specific balancing of Section 7 interests and property interests, including consideration of the availability of reasonable, effective alternative means of communication.[36] Thus, in *CDK Contracting*, the ALJ, upheld by the Board, applied a balancing test in concluding that the general contractor violated the Act by denying access to the union representative of employees of a subcontractor's subcontractor,[37] and neither the ALJ nor the Board stated that the breadth of the access clause language determined the legality of the denial of access; it was merely one of several important factors the Board examined in balancing the competing interests at stake.[38] Notably, the Board, in adopting the ALJ's application of the balancing test, distinguished *Lechmere* on the ground that the general contractor, by "invit[ing]" subcontractors onto the jobsite, had subjected its property rights to the union's contractual access rights with those subcontractors.[39] Accordingly, although the breadth of the access clause is relevant to the balancing test, it is not the *sine qua non*.[40]

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[35] To the extent that *Bobo Construction*, Cases 32-CA-25014 & -25085, Advice Memorandum dated Nov. 5, 2010; *Stonegate Construction, Inc.*, Case 20-CA-3072402, Advice Memorandum dated Jan. 23, 2003; and *S.D. Deacon Corp. of California*, Cases 32-CA-19543-1 and -19617-1, Advice Memorandum dated Dec. 6, 2002, suggest otherwise, they should no longer be regarded as correct since we now conclude that a balancing test is the correct analytical framework.

[36] *See, e.g., C. E. Wylie Construction Co.*, 295 NLRB at 1050 n.3 ("The analysis in *Villa Avila*, as the analysis in *Jean Country*, and the analysis combining those two cases in the instant case, begins with the balancing test enunciated in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).").

[37] 308 NLRB at 1121-22.

[38] We further note that, although the access clause at issue in *CDK Contracting* had broad language, it was not "unlimited." It required union representatives to "make their presence known to the management" at the jobsite and to "not unnecessarily interfere with the employees or cause them to neglect their work." *Id.* at 1117 n.3. That clause had greater restrictions than the access clause in *Villa Avila*, 253 NLRB at 81, which the Board described as "unrestricted" due to language stating that the union "shall have access to the project during working hours and shall make every reasonable effort to advise the Contractor or his representative of his presence on the project."

[39] *See CDK Contracting*, 308 NLRB at 1117.

[40] *See, e.g., C. E. Wylie Construction Co.*, 295 NLRB at 1050 n.3 ("The contracts giving the [u]nions access are not with the [general contractor] but[] with its subcontractors. Thus, standing alone, the contracts are not dispositive of the issues to be decided."),

In addition to the factors considered as part of the balancing conducted by the Board in *CDK Contracting*,[41] factors that are relevant in considering the strength of an employer's property right include: "the use to which the property in question is put; the restrictions, if any, that are imposed on public access to the property or the facility located on the property; and the size and location of the private property."[42] Utilizing those factors, the Board has noted that "'a single store surrounded by its own parking lot provided exclusively for the convenience of customers will have a significantly more compelling property right claim' than 'the owner of a large shopping mall who allows the general public to utilize his property without substantial limitation.'"[43] The Board has also noted that a property owner or surrogate weakens its property right when it allows outside persons or groups to utilize its property[44] and when it permits a contractor's employees or independent

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enforced, 934 F.2d at 239 (noting that the Board's decision "did not accord 'decisive weight' to the CBA provisions requiring jobsite access," and finding it "probable that in rejecting [the general contractor's] proposed limitation [on jobsite access], the NLRB implicitly decided that in future cases involving the absence of access provisions the balance would still tip in favor of the unions").

[41] In *CDK Contracting*, the Board has explained that a general contractor, by soliciting other employers to provide services at its jobsite, "'invited' subcontractors, and their respective subcontractors, onto the jobsite, and thus subjected its 'property rights' to the [u]nion's contractual 'access' rights with those subcontractors." 308 NLRB at 1117. *See also Villa Avila*, 253 NLRB at 81 (discussing *Scott Hudgens*, 230 NLRB 414 (1977)). Moreover, the Board found that a general contractor's property rights are further "diminished" when its contract with the subcontractor requires the subcontractor to comply with its labor agreements or to ensure timely job completion or labor peace. *CDK Contracting*, 308 NLRB at 1117 n.2, 1122-23.

[42] *C. E. Wylie Construction Co.*, 295 NLRB at 1055, citing *Homart Development*, 286 NLRB 714 (1987). *See also Caterpillar, Inc.*, 361 NLRB No. 77, slip op. at 1 n.2 (Oct. 30, 2014), *incorporating by reference* 359 NLRB No. 97, slip op. at 1 (Apr. 30, 2013) ("The Board has long considered access granted to third parties as a relevant factor under *Holyoke*, as allowing others to enter the property weakens the relative strength of the employer's interest in denying the union access to its property."); *C.C.E., Inc.*, 318 NLRB 977, 977 (1995) (rejecting employer's argument that providing access to the union, which represented its employees, would risk disclosure of confidential, proprietary, and trade secret information; employer had granted access to many individuals and groups, including school children, a video production crew, cub scouts, vocational students, potential customers, dealers and their drivers, and suppliers).

[43] *L & L Shop Rite*, 285 NLRB 1036, 1038 (1987) (finding, pre-*Lechmere*, that union's Section 7 interest in conducting area standards picketing on employer's property did not outweigh property interest), quoting *Fairmont Hotel*, 282 NLRB 139, 141 (1986).

[44] *See Thriftway Supermarket*, 294 NLRB 173, 173-74 (1989) (finding in pre-*Lechmere* case that, under *Jean Country* balancing test that applied to nonemployee union organizers, the employer "weakened" its property interests where it allowed other "noncustomer persons or groups" to access the property in order to hold events such as bake sales). *See also C. E. Wylie Construction Co.*, 295 NLRB at 1056 (under

contractor's employees to utilize its property.[45] Additionally, the employer's property interest is greater when permitting access could hinder production,[46] but weaker when the union's purpose for accessing the facility would not interfere with or disrupt work.[47] The nature of the workplace and the industry also impacts the strength of the employer's property interest. For example, the Board has stated that access provisions contained in a subcontractor's collective-bargaining agreement diminish the property interest of a construction-industry general contractor more than that of property-owners in other industries.[48] This is because "the general contractor receives substantial and immediate economic benefit from a harmonious relationship between the union and signatory subcontractors," which "is enhanced by readily available avenues of communication [to aid] the speedy resolution of the myriad of problems which are intrinsic to the construction industry."[49]

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balancing test, the fact that "[t]he jobsite was a construction site, not generally available to anyone other than contractors and their employees," was a factor that gave more weight to the general contractor's property interest).

[45] *See Trident Seafood Corp.*, 293 NLRB 1016, 1019, 1021 (1989) (finding, in pre-*Lechmere* case where union sought access to organize employees, that employer's property interest was weakened where it had permitted crewmembers from the approximately 300 fishing vessels under independent contract with the employer to moor at the employer's facility and use its showers, recreation room, laundry, company store, and cafeteria).

[46] *See, e.g., SCNO Barge Lines*, 287 NLRB 169, 169-70 (1987) (finding, pre-*Lechmere*, that the employer's property interest was strong where union sought access to its towboats, where space was confined; union organizers would need to pass through work areas, "necessarily raising the risk of interference with production," in order to access employees on their personal time; and coordinating a time for the union representatives to meet with employees on the towboats would burden employer personnel because the towboats were constantly in motion—never docking and rarely tying up along the riverbanks), *petition for review denied sub nom. Maritime Union v. NLRB*, 867 F.2d 767 (1989).

[47] *See C. E. Wylie Construction Co.*, 295 NLRB at 1056 (discussing the general contractor's property interest and noting that the union's jobsite access did not involve "picketing, property damage, disruption of work, or interference").

[48] *See Villa Avila*, 253 NLRB at 81-82.

[49] *Id.* at 82. The Board has also indicated that the property interest of a property owner is stronger, for purposes of this analysis, than that of a surrogate (e.g., a general contractor on a construction site). *See C. E. Wylie Construction Co.*, 295 NLRB at 1056 (noting that the general contractor's property rights were not as strong as the union's Section 7 rights, where, *inter alia*, the general contractor did not own or lease the property and the owner had no objection to union access).

Factors that the Board has considered in assessing the strength of unions' and employees' Section 7 interests in access cases include the particular reason access is being requested[50] and the breadth of the language in the contractual access provision.[51] The Board has also noted that where a collective-bargaining agreement contains a general access clause, the right of union-represented employees to receive their business representatives' services—a right they obtained through collective bargaining— "should not be easily nullified by a nonsignatory employer's action."[52]

The final part of the Board's balancing test is to determine whether the party seeking access has reasonable, effective alternative means of communication.[53] The Board does not examine asserted alternative means of communication in a vacuum; rather, reasonable alternative means are contingent upon the location on the spectrum of the respective Section 7 and property rights.[54] In *CDK Contracting*, the

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[50] *See, e.g., Wolgast Corp.*, 334 NLRB 203, 203 (2001) (union representative had sought access to the jobsite in order to investigate a safety complaint that an employee had filed the previous day), *enforced*, 349 F.3d 250 (6th Cir. 2003); *Mayer Group, Inc.*, 296 NLRB at 24 (union sought access in order to prepare steward's reports and solicit safety complaints and other grievances); *C. E. Wylie Construction Co.*, 295 NLRB at 1055 (union sought access to service employees and perform a safety check; the Board has "recognized that union agents have greater expertise in safety than the average employee and are less likely to fear retaliation for reporting a safety violation"). *See also id.* at 1055-56 (noting that union agents conducted themselves in a peaceful manner and that there was no evidence or contention that they sought to engage in secondary activity).

[51] *See, e.g., Villa Avila*, 253 NLRB at 81 (two of three relevant contracts allowed for access on any job where union members worked, and the third contract allowed for access during working hours and stated that union representatives shall make every reasonable effort to advise the employer of their presence; ALJ, in decision affirmed by the Board, construed clauses as granting "unrestricted" access); *CDK Contracting Co.*, 308 NLRB at 1117 n.3 (union representatives permitted on property if they "make their presence known" to employer and do not unnecessarily interfere with or cause employees to neglect their work). *See also C. E. Wylie Construction Co.*, 295 NLRB at 1050 n.3 (noting that, in *Villa Avila*, the significance of the union's contracts with subcontractors was the "enhancement their access provisions imparted to the Sec[tion] 7 rights involved in weighing those rights against the [general contractors'] respective property rights").

[52] *C. E. Wylie Construction Co.*, 295 NLRB at 1055.

[53] This is not the same standard as in *Lechmere, Inc. v. NLRB*, 502 U.S. at 539, which requires the location and living quarters of employees to be "beyond the reach" of reasonable efforts by nonemployee union representatives to communicate, such as logging camps, mining camps, and mountain resort hotels.

[54] *See Sahara Tahoe Hotel*, 292 NLRB 812, 814-17 (1989) (union lacked reasonable alternative means to communicate with employees regarding contract negotiations because this was a "fundamental Section 7 right" and employer's property right was

Board found that the union had no reasonable, effective alternative means of communication, based solely on an inference from the jobsite visitation clause in the union's contract with the subcontractor that the parties believed that access was "necessary to ensure contract compliance."[55] Additional factors that are relevant to the assessment of alternative means include, but are not limited to, "the safety of attempting communications at alternative public sites, the burden and expense of nontrespassory communication alternatives and, most significantly, the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message."[56] The Board has found alternative means to be ineffective, even if they would provide the union with the same information, if they would be likely to hinder or delay the receipt of the information.[57]

In cases where the Board has found that the union's right to access the property owner's premises outweighs the property owner's right to exclude the union from the premises, the Board has ordered the property owner to cease and desist from imposing "unreasonable or discriminatory rules relating to access."[58] Although such property owners were precluded from banning the unions from their property entirely, the Board made clear that it would not preclude restrictions that were "reasonable and nondiscriminatory" under the circumstances.[59]

"relatively modest" because union sought access to employee entrance, which was away from entrance used by customers). *See also C. E. Wylie Construction Co.*, 295 NLRB at 1056 (noting that although the Board's *Jean Country* case "identified the various factors within three categories labeled 'property rights,' 'Section 7 rights,' and 'alternative means,' those categories are not entirely distinct and self-contained. 'A given factor may be relevant to more than one inquiry.'"), quoting *Jean Country*, 291 NLRB 11, 13 (1988).

[55] *CDK Contracting Co.*, 308 NLRB at 1117. The Board's analysis in this regard is susceptible to an argument that it involves circular reasoning, *i.e.*, the Board has reasoned that the existence of an access provision itself establishes that any access that is permitted by the clause must be necessary. Although the existence of an access clause is undoubtedly relevant in considering whether there are reasonable alternative means, additional evidence regarding reasonable alternative means would be helpful in conducting a proper balancing test.

[56] *See C. E. Wylie Construction Co.*, 295 NLRB at 1056.

[57] *See, e.g., id.* at 1053, 1056 (where union representative sought access to construction jobsite to verify complaint that a union signatory was working on the jobsite but had not been properly using the hiring hall, alternative means were ineffective because the denial of jobsite "access was likely to hinder or delay resolution of such disputes").

[58] *See, e.g., CDK Contracting Co.*, 308 NLRB at 1117 n.1 & 1118.

[59] *See, e.g., id.* at 1117 n.1 (requiring access but permitting "reasonable and nondiscriminatory" escort requirement); *C. E. Wylie Construction Co.*, 295 NLRB at

B. The Union's right to access the businesses' facilities for representational purposes.

1. Additional investigation is needed to determine if the Section 7 interest in gaining access to non-secure areas and parking lots, as well as the potential unavailability of reasonable alternative means, outweighs the businesses' respective property interests.

In these cases, none of the businesses have a direct bargaining relationship with the Union. Additionally, they own their facilities, rather than merely being a property owner's surrogate.[60] And the businesses have legitimate and substantial security concerns, considering the industries in which they do business: data storage (Seagate) and medical technologies (Boston Scientific and Medtronic).[61] Yet, providing the Union access to the non-secure interior areas, such as conference rooms and the cafeteria, and the parking lot would not pose the same security issues that are inherent to other work areas and secure areas within the businesses' respective facilities.[62] And to the extent that security concerns are implicated, the businesses could satisfy those interests by requiring the Union to comply with the same measures that it has required of other nonemployee visitors to the property.[63]

1050 n.2 & 1057 (requiring access but permitting "uniformly applied, reasonable rules regarding safety, working time, and security" if the union is given clear notice of such rules).

[60] *See supra* note 49.

[61] *See New Process Co.*, 290 NLRB 704, 705 (1988) (finding, pre-*Lechmere*, that employer had a strong property right at the warehouse facility that the union sought access to for organizational purposes, where the warehouse was used to store, inspect, pack, and ship merchandise; warehouse was located away from the highway on a large tract of land devoted exclusively to the employer's business; and customers were not invited to the property to conduct business), *enforced mem.*, 872 F.2d 413 (3d Cir. 1989) (Table). *See also Oakland Mall, Ltd.*, 304 NLRB 832, 840 (1991) (noting that, under *Jean Country*, the Board is more likely to find that a property owner's denial of access to the union is unlawful "'when the property is open to the general public than when a more private character has been maintained'"), *remanded in light of the Supreme Court's Lechmere decision*, 957 F.2d 912 (D.C. Cir. 1992) (Table).

[62] *See generally C. E. Wylie Construction Co.*, 295 NLRB at 1056 (discussing the general contractor's property interest and noting that the union's site visits did not involve "picketing, property damage, disruption of work, or interference" with the general contractor's jobsite); *Emery Realty*, 286 NLRB 372, 373 (1987) (where the property owner had permitted nonemployee organizations to solicit in the same area where the union sought to handbill, the union's desired use for the property was not inconsistent with the past use of the property and would not hinder its normal use), *enforced*, 863 F.2d 1259 (6th Cir. 1988). *See also supra* notes 46-47.

Indeed, all three businesses have, through their own business dealings and other conduct, diminished the strength of their respective property interests.[64]

First, because each business has contracted with another entity—ABM or SBM—to provide onsite daily cleaning services, and their facilities are the janitorial employees' only worksites, the businesses are presumed to have "constructive notice" of the access provisions in the cleaning contractors' collective-bargaining agreements.[65] In this regard, the Board has recognized the voluntary nature of these contractual relationships; property owners and general contractors have the right to require that contractors and subcontractors be non-unionized entities.[66] When such an owner or general contractor makes the affirmative business decision to contract with unionized entities, it is ill-positioned to thereafter claim an unfettered right to deny entry to union representatives whose collective-bargaining agreements contain access provisions. Therefore, the Board, balancing the conflicting interests, reasonably regards the owner or general contractor as having voluntarily elected to

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[63] *See, e.g., C.C.E., Inc.*, 318 NLRB at 977 (in case where employer had direct bargaining relationship with union, Board rejected employer's argument that granting access to union would risk disclosure of confidential, proprietary, and trade secret information, because employer had granted access to other nonemployees and alleviated those concerns by requiring them to provide advance notice and be accompanied by an employer representative, instituting certain safety measures, and concealing distinctive product features from view); *Hercules Incorporated*, 281 NLRB 961, 969-71 (1986) (in case where employer had direct bargaining relationship with union, Board rejected employer's argument that its proprietary and confidentiality interests outweighed the union's interest in conducting onsite safety studies because the employer had permitted contractors and their employees to enter the area subject to signing a confidentiality agreement to protect its trade secrets), *enforced*, 833 F.2d 426 (2d Cir. 1987).

[64] *See, e.g., Emery Realty*, 286 NLRB at 373 (finding, pre-*Lechmere*, that the employer "weakened" its property interest by permitting the Salvation Army, Shriners, and Girl Scouts to solicit around the same area where the union sought to distribute organizational handbills, because the union handbilling was not inconsistent with the past uses of the property and would not "hinder in any significant respect the normal use of its property.").

[65] *See, e.g., C. E. Wylie Construction Co.*, 295 NLRB at 1050; *Villa Avila*, 253 NLRB at 81.

[66] *See, e.g., Edward Carey, et al., Trustees of UMW*, 201 NLRB 368, 369 (1973) ("Section 8(a)(3)…does *not* 'protect employers as well as employees from employer discrimination[.]'") (emphasis in original); *Local No. 447, Plumbers (Malbaff Landscape Construction)*, 172 NLRB 128, 129 (1968) (an employer may lawfully cease doing business with another employer "because of the union or nonunion activity of the latter's employees").

subject its property rights to the access provision in the subcontractor's agreement with the union.[67]

Also, ABM's service contract with Boston Scientific has a provision that further diminishes Boston Scientific's property interest. The service contract contains the broad requirement that ABM use its "best efforts" to avoid "work stoppages, slowdowns, disputes, and strikes" with its employees, and that ABM ensure that Boston Scientific receives at least a "minimum level" of cleaning services.[68] Boston Scientific has therefore reduced the strength of its property interest in favor of provisions in ABM's contract with the Union—including the access provision—to the extent enforcement of those provisions promote labor peace.[69] Additionally, although it is unclear whether Medtronic's service contract with SBM contains a similar provision because the copy of that service contract provided to the Region has been mostly redacted, Medtronic's communications suggest that it holds SBM responsible for maintaining labor peace so as to ensure that Medtronic's business runs smoothly. Specifically, in February 2013, after Medtronic officials learned about a potential Union strike that could involve the SBM employees who cleaned its facilities, it requested assurances from SBM that it would at least receive a minimum level of cleaning services.[70]

Furthermore, all three companies have diminished the strength of their property interests by inviting a variety of nonemployees to utilize the same non-secure areas of its facilities and parking lots that the Union sought access to. For example, Boston Scientific has permitted Costco to set up tables inside its facilities to sell memberships to Boston Scientific employees, Seagate permits various commercial vendors to hold a vendor fair in its cafeteria, and Medtronic has permitted outside

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[67] *See, e.g., CDK Contracting*, 308 NLRB at 1117 (the general contractor, "by soliciting other employers to perform work at the jobsite, 'invited' subcontractors, and their respective subcontractors, onto the jobsite, and thus subjected its 'property rights' to the [u]nion's contractual 'access' rights with those subcontractors").

[68] *See, e.g., id.* at 1122 (finding that a general contractor had "compromised [its] property claim" by including provisions in its own subcontracting agreements requiring subcontractors to "fully abide by" their labor agreements).

[69] *See, e.g., Scott Hudgens*, 230 NLRB at 417-18 (noting that shopping center owner had weakened its property rights where, even though it was a "neutral" in the sense that it was not a party to its tenant's labor dispute, it had a financial interest in the success of its tenants because it received a percentage of the stores' gross sales as part of their rental arrangement).

[70] The Region should obtain unredacted versions of Medtronic's and Seagate's service contracts with their respective janitorial contractors to determine if their contracts also include a similar "labor peace" provision.

entities to hold a book fair and a farmer's market on its premises.[71] Medtronic has also contracted with Caribou Coffee and a retail store to provide services to Medtronic employees, and therefore has permitted additional non-Medtronic employees to regularly access its facilities to work at those stores.[72]

On the other side of the equation, the Union has a strong Section 7 interest, in general, in communicating with the employees it represents regarding enforcement of their contractual rights.[73] Furthermore, the inclusion of an access clause in the Union's collective-bargaining agreements "enhances" the Section 7 rights of the Union and the unit employees, even though the clause contains a restriction that the clauses at issue in prior Board cases did not contain.[74] Indeed, although the clause contains limitations on access to accommodate the property owner's "security" requirements

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[71] *See Thriftway Supermarket*, 294 NLRB at 173-74; *Emery Realty*, 286 NLRB at 373. *See also C.C.E., Inc.*, 318 NLRB at 977 (determining, under *Holyoke*, that the employer's confidentiality concerns were unfounded because it had provided facility access to many individuals and groups, including school children, a video production crew, cub scouts, vocational students, potential customers, dealers and their drivers, and suppliers).

[72] *See, e.g., McDermott, Inc.*, 305 NLRB 617, 618 (1991) (under *Jean Country* balancing test, the employer's property interest was "very strong" where, *inter alia*, it limited facility access "to individuals necessary for its operation."); *C. E. Wylie Construction Co.*, 295 NLRB at 1055-56 (the fact that the construction site was not generally available to anyone other than contractors and their employees was a factor that strengthened the general contractor's property interest in excluding the union representatives). *Cf. Caterpillar, Inc.*, 361 NLRB No. 77, slip op. at 1, n.2, *incorporating by reference* 359 NLRB No. 97, slip op. at 1.

[73] *See, e.g., CDK Contracting*, 308 NLRB at 1121 ("Personal contact with a union representative is typically essential to, and an integral part of, employees' exercise of Section 7 rights."); *Sahara Tahoe Hotel*, 292 NLRB at 815 ("[T]he right of a union to establish communications with the employees it represents and inform them about proposed contract terms that would cover those employees and seek employee input and questions regarding the contract negotiations is a fundamental Section 7 right."); *NLRB v. Villa Avila*, 673 F.2d at 283 (the subcontractor's "[c]ompliance with many contract provisions can be effectively policed only on the premises where the [union] agent may observe conditions during work hours"). *See also National Broadcasting Co.*, 276 NLRB 118, 118-19 (1985) (in case where the union and employer had a direct bargaining relationship, the union needed access for the general purpose of policing its collective-bargaining agreements, including work jurisdiction provisions), *enforced*, 798 F.2d 75, 77-78 (2d Cir. 1986).

[74] *Cf. Villa Avila*, 253 NLRB at 81 (where two of the three relevant contracts allowed for access on any job where the union members worked, and the third contract allowed for access during working hours and stated that union representatives shall make every reasonable effort to advise the employer of their presence on this project, the administrative law judge construed the clauses as granting "unrestricted" access).

and other "establishment rules," these limitations were likely included to ensure no disruption to the property owners' business. The Board has found those kinds of limitations to be applicable even to unions with access clauses that have less restrictive language than the clause involved in this case.[75]

But some additional investigation is needed to determine with greater precision the relative strength of the Section 7 interest. The current evidence indicates that the Union was concerned about employees' workloads and may have wanted to perform walkthroughs of the employees' work areas, pursuant to Article 19.1 of its collective-bargaining agreement. Indeed, a Union representative specifically communicated to a Boston Scientific representative that [redacted] needed to access employees at work during their breaks in order to provide them with information and to receive employees' feedback about their jobs. It is unclear, however, whether the Union actually requested a walkthrough at Boston Scientific or articulated what specific portion(s) of the facility it wanted to access. And it is unclear whether the Union (and/or the respective janitorial contractors) provided Seagate and Medtronic with any explanation as to why the Union wanted to access their facilities. The Region should conduct additional investigation in this regard.

With regard to whether the Union had reasonable, effective alternative means for obtaining the information it was seeking, we conclude that there is currently insufficient information to make an assessment. First, as noted *supra*, the Board examines asserted alternative means of communication in context with the property interests and Section 7 interests at issue, and the record here is incomplete as to those matters. Thus, it is unclear whether the Union was only seeking access to meet with employees or whether it was also interested in performing "walkthroughs" of the employees' work areas. To the extent the Union wanted to meet with employees, the Region should investigate the Union's experiences communicating with employees at

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[75] *Compare Peck/Jones Construction Corp.*, 338 NLRB 16, 16-17 (2002) (finding that employer could require union representatives to comply with "reasonable and non-discriminatory" security rule that was consistent with the access provision in the union's contract with the employer's subcontractor) and *C. E. Wylie Construction Co.*, 295 NLRB at 1056 (reasonable restrictions such as requiring a union representative to sign a log book and check in with a security guard are permissible), *with Subbiondo & Associates*, 295 NLRB at 1116 ("An escort is a reasonable precaution for the casual visitor, but it cannot be a requirement for a union representative in a lawful visit to employees on a worksite," as union representatives are familiar with construction projects and act at their own risk if they ignore safety warnings and precautions). *See also Ojai Valley Inn & Spa*, Case 31-CA-26677, Advice Memorandum dated July 9, 2004, pp. 8-9 (employer could not lawfully require union representatives seeking access pursuant to "unlimited" access clause to have an escort or provide at least one-day's notice of their visit).

meetings off the premises; by phone, email, or regular mail; or through coworkers.[76] If, for example, the investigation reveals that the Union needed to hold group meetings with employees who work multiple jobs and are therefore unavailable during non-work hours, there would be a strong argument that the Union lacked reasonable, effective alternative means of communication. If the Union also wanted to perform "walkthroughs" of employee work areas, the Region should investigate what information the Union looks for during a walkthrough and whether it can reasonably and effectively obtain the same information by simply communicating with the employees.[77]

Several cases involving an employer's obligation to grant access to a union for representational purposes provide guidance on the additional investigation needed with respect to reasonable, effective alternative means. For example, the Board has found that a union had no reasonable, effective alternative means to carry out its representational duties other than by accessing the employer's premises where the union needed to: investigate work-related accidents and deaths;[78] assess new machinery and production processes that the employer had implemented;[79] observe employees operating forklifts in order to evaluate complaints that they were overworked and to argue that the workload required a pay increase;[80] take temperature measurements in response to employee complaints and injuries related

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[76] *See, e.g., Sahara Tahoe Hotel*, 292 NLRB at 816 (discussing how the union's attempts to communicate with employees by phone and regular mail were inadequate because the employer provided it with an incomplete list of employees' names, addresses, and phone numbers, and much of the information provided was inaccurate).

[77] *See Washington Beef, Inc.*, 328 NLRB 612, 618-19 (1999), quoting *C.C.E., Inc.*, 318 NLRB at 978 (determining that the union's solicitation of employee complaints relating to safety and injury issues was an inadequate substitute for directly observing working conditions, because "'there can be no adequate substitute for [a] [u]nion representative's direct observation of . . . employee operations and working conditions, in order to evaluate . . . safety concerns. . .'").

[78] *See, e.g., Caterpillar, Inc.*, 361 NLRB No. 77, slip op. at 1, n. 2, *incorporating by reference* 359 NLRB No. 97, slip op. at 5-6; *Hercules Incorporated*, 281 NLRB at 970; and *ASARCO, Inc.*, 276 NLRB 1367, 1369-70 (1985), *enforced in part*, 815 F.2d 75 (6th Cir. 1987).

[79] *See, e.g., Brown Shoe Co.*, 312 NLRB 285, 285 & n.3 (1993) (union needed access to employer's premises to conduct time study in light of employees' decline in wages under the employer's piecemeal compensation system and their inability to keep up with production, which allegedly resulted from the employer installing new machinery), *enforcement denied*, 33 F.3d 1019 (8th Cir. 1994).

[80] *See, e.g., Nestle Purina Petcare Co.*, 347 NLRB 891, 891-93 (2006).

to heat;[81] observe the employees working at the employer's remote site in order to assess whether non-unit personnel were performing unit "cueing" work;[82] and formulate a negotiating strategy and/or bargaining proposals related to employees' jobs and other working conditions.[83]

This additional investigation will also help determine what "reasonable and nondiscriminatory" restrictions the businesses may lawfully impose if, on balance, they may not lawfully ban the Union from accessing their premises entirely.

2. Additional investigation is needed in order to determine whether the Union and employees' Section 7 rights outweighed the businesses' property interests with regard to facilities' *secure* areas.

There is also insufficient information to determine whether the businesses' property interests outweighed the Union's and the unit employees' Section 7 right to have the Union representatives access *secure* areas of the businesses' facilities. Initially, the Region should determine whether the Union sought access to secure areas, as this is unclear from the current record. If not, the Region need not conduct further investigation regarding access to secure areas. If, however, the Union did request access to secure areas in order to perform a walkthrough or otherwise ensure contractual compliance, then additional information is needed in order to assess the parties' respective interests.[84] For example, the evidence does not indicate what particular confidentiality and other interests could be compromised by granting the Union access to particular secured areas at the businesses' respective facilities.[85]

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[81] *See American National Can Co.*, 293 NLRB 901, 904-06 (1989), *enforced*, 924 F.2d 518 (4th Cir. 1991).

[82] *See National Broadcasting Co.*, 276 NLRB at 118-19

[83] *See, e.g., New Surfside Nursing Home*, 330 NLRB 1146, 1150 (2000) (finding that the union's need to obtain information about employee work processes for the purposes of bargaining outweighed the employer's property rights); *C.C.E., Inc.*, 318 NLRB at 978 (concluding that there is no adequate substitute for a union representative's "direct observation of the plant equipment and conditions, and employee operations and working conditions, in order to evaluate matters such as job classifications, safety concerns, work rules, relative skills, and other matters necessary to develop an informed and reasonable negotiating strategy").

[84] This additional investigation will also help determine what "reasonable and nondiscriminatory" restrictions the businesses may lawfully impose if, on balance, they are not permitted to ban the Union from accessing their secure areas entirely.

[85] Also, Seagate has given tours and demonstrations at its facilities to various outside groups, and it is possible that this included access to secure areas. In this regard, further investigation would be necessary to properly analyze whether Seagate weakened its property interest as to its secure areas.

Furthermore, with respect to reasonable, effective alternative means, the Union has not yet articulated why speaking with employees is not an adequate substitute to conducting a walkthrough of the employees' workspaces located in secure areas.[86] The Region should conduct further investigation into these matters and resubmit the case to Advice.

III. Conclusion.

In sum, we conclude that Seagate, Boston Scientific, and Medtronic each violated Section 8(a)(1) by discriminatorily denying access to the Union to their respective facilities for representational purposes while granting access to other nonemployee groups, and that Medtronic also violated Section 8(a)(1) because its Facility Common Space Usage policy is facially discriminatory and it promulgated a revised rule in response to Section 7 activity. The Region should perform additional investigation to determine whether the businesses' denials of access to the Union also violated the Act, even absent sufficient evidence of disparate treatment, based on a balancing of the Union's and employees' Section 7 interests and the businesses' respective property interests, as well as consideration of reasonable, effective alternative means.

/s/
B.J.K.

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[86] *See C. E. Wylie Construction Co.*, 295 NLRB at 1056 (stating that the Board rarely finds that there are reasonable, effective alternative means to conducting an unannounced safety inspection). *See also supra* notes 50, 77-83, and accompanying text.